

No. 2858

IN THE

# United States Circuit Court of Appeals

For the Ninth Circuit

GIN DOCK SUE,	}
<i>Defendant and Appellant,</i>	
VS.	
THE UNITED STATES OF AMERICA,	
<i>Plaintiff and Appellee.</i>	

## BRIEF FOR APPELLANT

GEO. A. MCGOWAN,  
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Filed this.....day of February, 1917.

FRANK D. MONCKTON, *Clerk*

**Filed**

By.....  
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**F. D. Monckton,**  
Clerk.



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### Statement of the Case.

The facts of this case as far as heard by the District Court are not in dispute and are to be found in the evidence introduced before the Commissioner (Tr. 15-33), said proceedings having been transcribed and filed by consent in the District Court (Tr. 33-34), and the additional proceedings before the District Court, the facts as there additionally agreed and stated by counsel (Tr. 33-47), and in addition the stipulation as to the ultimate facts appearing from the Immigration Record (Tr. 50-52), the record itself having been held inadmissible.

A stipulation and order approving statement of the case and agreed statement of facts with respect

thereto is contained in the transcript, pages 53 and 54. There is some confusion in the record over the family name of the defendant and appellant, it being given in some places as Chin whereas it should have been spelled Gin. This is covered in the stipulation and order mentioned. The stipulation and order refers to the transcript of the hearing had on May 13th before the District Court and all of the prior proceedings were therein introduced in evidence. The facts as far as heard by the District Court are as follows:

The appellant in this action, Gin Dock Sue, is an alien Chinese person who first entered the United States in the year 1881 (Tr. 24). He continued to reside in the United States, and when Congress subsequently passed the Chinese Registration Act the defendant complied therewith by procuring a certificate of registration, which was numbered 138680. This certificate was subsequently lost or destroyed, and upon satisfactory proof thereof being submitted to the Collector of Internal Revenue for the Port and District of San Francisco, a duplicate thereof was issued, which duplicate bore the number of 141274. Both of these certificates were issued to the defendant in the name of Gin Soo, describing him as a person other than a laborer, and residing in Los Angeles, California; that his local address was No. 38 Marchesault Street, Los Angeles; that his occupation was that of a pawnbroker, and that annexed to the said certificate was a photographic likeness of the person to whom the

certificate was issued (Tr. 30 and 66-67, Exhibit B). The defendant desired to go to China upon a temporary visit and filed an application to depart as a laborer, submitting his certificate of registration, and as evidence of his right to make the trip in question, that he had a wife living in this country, and that he also had property interests here valued in excess of the sum of \$1000. The representations contained in the application to depart were examined and approved by William S. Walter, the deputy Collector of Customs for Los Angeles (Tr. 31 and 68-70, Exhibit C). The defendant then came to San Francisco, and sought to depart for China upon said laborer's certificate, but he was prevented from doing so by a ruling of the department, which held that Chinese persons who possessed certificates issued to them, in which their occupation was described as a person "other than a laborer," could not avail themselves of the provisions of the law applying to "laborers," notwithstanding they had the necessary property or family qualifications. The defendant was thereupon prevented from going to China as a laborer (Tr. 31-32). The certificate of residence of the detained has been submitted in evidence, as also the latter portion of printed decision No. 10 of the Department of Commerce and Labor, quoting Treasury decision No. 23525 of Feb. 17, 1902, which confirmed the holding of the department in refusing to the defendant a laborer's return certificate, and the testimony of the defendant further show-

ing that a person having the occupation of a pawnbroker was then considered as a person other than a laborer and a merchant (Tr. 35-36). The defendant thereafter sought to go to China as a merchant, and departed from the United States from the Port of San Francisco, and by way of the Port of Honolulu, and he did so depart on the 9th day of July, 1907, and the defendant returned to the United States by way of the Port of Honolulu and arrived at the Port of San Francisco on the 14th day of July, 1908, upon which trip he had ticket No. 51 on the S. S. "Korea" (Tr. 50-51). The entire absence of the defendant from the United States, counting the departure from Honolulu and the arrival at Honolulu, that port being the last of the United States touched on the outward voyage, and the first United States port touched on the inward voyage, being under the period of one year (Tr. 32). The defendant claimed as his right to enter the United States that he was a resident Chinese merchant, lawfully domiciled therein. The application was examined by the proper immigration officials, and was denied upon the 26th day of August, 1908. An appeal was taken from this adverse decision to the Secretary of Commerce and Labor, which official confirmed the excluding decision of the port officials. Thereafter an application for a rehearing was made in which the contention was advanced that a conspiracy existed among the enemies of the defendant to prevent his re-entry into the United States, and

that he was a merchant as claimed, and that the true facts had not been brought to light in the former examination of his case. This application for a rehearing was partially investigated, and was being considered by the immigration officials when upon the 28th day of November, 1908, the defendant escaped from his place of detention at the old Pacific Mail Dock in San Francisco, and thereafter upon the date indicated the following order was made:

“San Francisco, Dec. 8, 1908. This man escaped from the Pacific Mail Steamship Company, and is a fugitive—Application for a rehearing denied. H. H. North, Commissioner.” (Tr. 43-44 and 50-52).

It is claimed upon behalf of the defendant that thereafter he purchased a mercantile interest in a store in San Luis Obispo, and remained engaged there as a merchant, engaged in buying and selling merchandise at a fixed place of business for about a period of two and one-half years (Tr. 45), and that thereafter he came to San Francisco, and became engaged in San Francisco as a merchant, and has ever since said time been so engaged in business as a merchant engaged in buying, selling and dealing in merchandise at a fixed place of business, and engaged in the performance of no manual labor of any kind or description whatever. The San Francisco store of which defendant was and is a member as aforesaid is the firm of Chung Lung Jan and Co., 827 Grant Avenue, San Francisco (Tr. 18-22).

The defendant during the month of November, 1913, was elected to the office of Secretary of the Ning Yung Association, one of the Chinese Six Companies. The said office of Secretary is an official position, and the holder thereof is an official of the Chinese Government, and an ex-officio attache of the Chinese consulate of the Port and District of San Francisco, and as such an official of the Chinese Government (Tr. 15-18, 23-24 and 37-40).

The defendant herein was arrested upon a complaint sworn to on the 18th day of January, 1913, charging him under the name of Yung Lung Soo, alias Chin Tock Sing, with being a Chinese manual laborer unlawfully within the United States without a certificate of residence (Tr. 2-3). It appears that the defendant did have a certificate of residence, therefore a second complaint was filed against the defendant in which he was charged under the names of Yeung Lung Soo, alias Gin Dock Sue. This latter complaint was sworn to upon the 18th day of March, 1914, and does not charge the defendant with being a laborer but does charge him with being a Chinese person who had illegally entered the United States and who had not been found admissible thereto by the immigration authorities (Tr. 6-8).

Upon the trial of this matter before the Commissioner and before the Court it is established by the testimony and has been admitted that the defendant is an alien Chinese person who entered the

United States as above set forth; that he does have a certificate of registration, that he did apply to go to China as a laborer; that he did not so depart for the reasons stated in his testimony; that thereafter he attempted to go to China as a merchant, and be landed upon his return; that his entire absence from the United States was within the period of one year; that he was denied readmission into the United States; that he applied for a rehearing; that during the pendency thereof he escaped from custody. That the defendant ever since has been, and now is a merchant, and that since November, 1913, defendant has in addition thereto been a Chinese official as hereinbefore stated, and an ex-officio attache of the Chinese consulate for the Port and District of San Francisco. The Government in this matter has introduced no evidence nor made any showing to offset the mercantile or official status of the defendant, and seem to content themselves solely with the admitted fact of the clandestine re-entry of the defendant into the United States upon the 28th day of November, 1908, claiming that no legal status could thereafter be predicated upon such an irregular entry.

It might be further stated that upon the 27th day of January, 1914, the Commissioner of Immigration forcibly took the defendant in this matter into custody, and took him to the immigration station, and there held him for the purpose of deporting the defendant to China, upon the theory that he had escaped from the jurisdiction of the immi-

gration officers, and that now that they had him back into custody they could deport him upon the unexecuted order denying him admission in the United States entered upwards of five years prior to that time. A writ of habeas corpus was applied for in the lower Court, which is numbered 15527 in the records and files of the District Court. It is shown in this matter that the defendant was a merchant, a member of the firm of Quong Sang and Co. at San Luis Obispo for about two and a half years after his clandestine entry into the United States, and further that the said defendant was a Chinese official, as hereinbefore set forth. Upon a hearing had upon this matter in chambers the Court decided that the immigration officials had lost their jurisdiction by the lapse of time, and that if the defendant was to be deported that could only be accomplished by a judicial deportation proceeding, and thereupon the defendant was discharged from custody, and the judicial deportation proceeding was thereafter proceeded with. The amended complaint alleging the exact charge against the defendant with clandestinely re-entering the United States was filed after the disposition of the habeas corpus matter (Tr. 41).

The questions presented in this matter are three:

*First*, may the defendant as such Chinese official be deported out of the United States under and by virtue of the terms of the Chinese Exclusion and Restriction Acts?

*Second*, may the defendant who has been engaged in business as a Chinese merchant in California for six years and a half last past be deported, he not being a laborer, for a prior irregular re-entry?

*Third*, has not the Court now jurisdiction in this matter to examine into the mercantile status of the defendant for the year prior to his departure from the United States on the 9th day of July, 1907?

#### FIRST.

**MAY THE DEFENDANT AS SUCH CHINESE OFFICIAL BE DEPORTED OUT OF THE UNITED STATES UNDER AND BY VIRTUE OF THE TERMS OF THE CHINESE EXCLUSION AND RESTRICTION ACTS?**

The evidence in this matter shows that it is conceded that this defendant is and has been since November, <sup>1913</sup> ~~1914~~, a Chinese official. This is shown by the testimony of the defendant, and different white witnesses who testified upon his behalf, and also upon the testimony of the Chinese Consul.

The Chinese Consul for this port testified under oath that this defendant was a Chinese official connected with and attached to the Chinese consulate of this port and district, and further, that he was a member of the advisory board attached to the Chinese consulate and that members of this board had the status of Chinese officials and were landed as such direct from the steamer upon their arrival from China, and that neither the restrictions of the Immigration Act nor of the Chinese exclusion laws had any application to them at all, for the

reason that as officials they were exempt from the operations of the said laws. The statute which shows the exemption of any such official is the Act of May 6, 1882, as amended by the Act of July 5, 1884, Section 13 thereof, providing as follows (*Italics volunteered*):

“That this act shall not apply to diplomatic *and other officers* of the Chinese or other Governments traveling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and *shall exempt them and their body and household servants from the provision of this act as to other Chinese persons.*”

The more recent Act of Congress, that of September 13, 1888, also contains this exemption in Section 14 thereof, which provides as follows (*Italics volunteered*):

“That the preceding sections shall not apply to Chinese diplomatic *or consular officers or their attendants*, who shall be admitted to the United States under special instructions of the Department of Commerce and Labor, without production of other evidence than that of personal identity.”

A reading of these two sections distinctly shows that it is not alone the diplomatic officer who is exempted from the operation of these acts, but consular officers and their attendants and also other officers of the Chinese or other governments. It is in evidence that the political branch of the Government of the United States, through the immigration officers, recognizes the official status of men

holding a position similar to this defendant, and not only permits them to land from China direct from the steamer as being entirely exempt from the operations of these laws, but their families and servants as well are entitled to and receive this exemption. This is an actual condition of affairs which exists at this port and has ever since the Chinese exclusion laws have been in force, and during all of these thirty odd years men holding these positions have been recognized as officials and have received all the courtesies which belong to men of their rank. It is shown by the testimony of the Chinese Consul General that the position of this defendant is an elective one, and that these different Chinese companies in reality correspond to the different political districts of China from which the Chinese residents within the United States emigrated; that these societies are political in character and their object and purpose is to take care of the interests and rights of the different Chinese persons coming from those particular districts in China. The Ning Yung Association, of which the defendant is the Secretary, is composed of those persons who formerly lived in the Sun Ning District in China, and its membership is the largest of any of the different official Chinese associations. The President of this company was present at the trial, though not sworn as a witness, and he exhibited his credentials issued by the Chinese minister at Washington, and it was further in evidence that he was recently landed direct from

China, accompanied by his body servant, and that the provisions of the Chinese Restriction Acts had no application to him, and more recently two of his sons have been landed in the United States (Tr. 46-47). The Chinese Consul General further testified that in those instances where the elected official resided in this country they did not apply to the Chinese Minister for a certificate for the reason that the person was already domiciled in this country, but that in those instances where the elected official resided in China, that then the certificate was asked for and obtained, and was always recognized by our Government. He further testified that if this defendant had resided in China at the time of his election that a certificate would have been obtained from the Chinese Minister and the defendant would have been immediately landed upon it. The testimony of the Consul General further shows that this man is a Chinese official attached to the consulate at this port and district. The Government has not met this showing nor answered it in any manner, shape or form, and the very obvious reason for this is that it is *unanswerable*. It stands to reason that the official status of the defendant being established and conceded, that by the very terms of the Acts which are the source of the Court's jurisdiction, that the status of this defendant as such official is completely exempt from the provisions of the Acts, and as to him they have absolutely no application whatsoever.

The Chinese Restriction Act of May 6, 1882, as amended by the Act of July 5, 1884, provided that all Chinese of the exempt class about to come to the United States should have a certificate and that none should be landed without it, but the Supreme Court, in the case of *Lau Ow Bew v. U. S.*, 144 U. S. 47, there decided that where the member of the exempt class is domiciled in this country that of course this certificate is not required of him. The opinion in this case was written by Chief Justice Fuller and in reaching this point the following language is used (page 521, Sup. Ct. Reporter, Vol. 12):

“But Chinese merchants domiciled in the United States and in China only for temporary purposes, *animo revertendi*, do not appear to us to occupy the predicament of persons ‘who shall be about to come to the United States’, when they start on their return to the country of their residence and business. The general terms used should be limited to those persons to whom Congress manifestly intended to apply them; and they would evidently be those who are about to come to the United States for the first time, and, therefore, might properly be required to apply to their own government for permission to do so, as also to so identify them as to distinguish them as belonging to the classes who could properly avail themselves of such leave.” \* \* \*

“Tested by this rule, it is impossible to hold that this section was intended to prohibit or prevent Chinese merchants, having a commercial domicile here, from leaving the country for temporary purposes, and then returning to and re-entering it; and yet such would be its

effect, if construed as contended for on behalf of appellee.”

Tested by this rule it is obvious that this defendant being domiciled and residing in this country, he would not have any occasion to have a certificate issued to him, but would merely need to present evidence of his official status in the language of the Act last above mentioned, which does not require any certificate at all, but only requires evidence of *personal identity*. In this case we have presented evidence of the personal identity of the defendant and also evidence of his official status and standing. These facts have been established by the testimony of the Chinese Consul-General for this port, Mr. Ow Young Kay, the Secretary of the Chinese Six Companies; Gee Sam King, the defendant himself, and the two white witnesses who testified as to his mercantile status and also knew him as an official. The Government has not controverted or sought to meet this showing in any way, manner, shape or form, and it must therefore be taken as conclusively established that this defendant has the status of a Chinese official, connected with the Chinese consulate for this port and district, and as such official he is entitled to the protection of the two sections of the Chinese Exclusion or Restriction Acts hereinabove mentioned. These same two Acts are the ones which the Government insists are the source of its authority for instituting and prosecuting this present case, and it might be added that they also are the sole source of the Court's author-

ity and jurisdiction in deportation cases of this character, and when it is shown by almost the concluding sections in each of these two Acts that Chinese officials are absolutely exempted from the provisions of the Act, that the entire Act shall not apply to them, it leads us to the conclusion that the only order which can lawfully be entered in this case is one that will order the defendant discharged from custody upon the ground of his official status, which exempts him from the provisions of these Acts.

By reason of the fact that merchants, teachers, students and travelers for curiosity and pleasure are referred to as members of the so-called exempt classes, I feel it necessary to say that their exemption does not have reference to the law itself but rather to their exemption from among those Chinese persons who may not come to this country while the exemption of the official is much a different thing, for not only may he come with his servants, both body and household, and his attendants, but they are all *absolutely exempted from the provisions of the law*. In this case therefore the Government is trying to deport an *official* of the *Chinese Government* under a law which by its own terms shall not apply to them.

The official status of this defendant clearly exempts him from the operation of such a proceeding as it is attempted to institute and prosecute against him in the case at bar. The proper way to remove

this defendant from the United States would be for the State Department to make representations to the Chinese Minister looking to the return to China of this attache of the Chinese consulate at San Francisco, upon the ground that his presence in such official capacity is unwelcome to the Government of the United States. I doubt very much if the political branch of the Government, in view of all of the facts, would feel warranted in taking any such action against this Chinese official.

I reserve for presentation under the next portion of this brief the question springing from the irregular entry into the United States of the defendant, merely contenting myself with the observation in this place that such irregular entry did not prevent or prohibit this defendant from being elected to the political position which he occupies. It is clearly shown that such officials are elected politically by the Chinese people, and are recognized by the Minister and Chinese Consul-General for this port in view of their said election. Recognition of this defendant's official position as an attache of the Chinese consulate is by the Consul-General of China himself in his deeds in connection with the performing of the duties of his office, and he has testified under oath in this proceeding that this defendant has been so recognized by him as such an official and attache of his consulate.

## SECOND.

**MAY THE DEFENDANT WHO HAS BEEN ENGAGED IN BUSINESS AS A CHINESE MERCHANT IN CALIFORNIA FOR SIX YEARS AND A HALF LAST PAST BE DEPORTED, HE NOT BEING A LABORER, FOR A PRIOR IRREGULAR RE-ENTRY?**

It is contended upon behalf of the Government in this matter that an illegal residence follows an irregular entry, and that irrespective of the passage of time a legal residence cannot be predicated upon or follow an irregular entry. We take issue on this, and point to the following cases:

In the case of *Tsoi Sim v. United States*, 116 Fed. Rep., p. 925, in which a Chinese girl, unlawfully within the United States because she did not secure a certificate of registration, thereafter married a citizen of the United States and cured the illegality of her residence, the Court held:

“Whatever effect her error of omission in failing, during a few years of her infancy, to obtain a certificate of registration, if any she was entitled to, it certainly did not deprive her of the right to marry an American citizen lawfully domiciled in this country. This she did. By this act, her status was changed from that of a Chinese laborer to that of a wife of a native-born American. Her husband is not before the Court, but his rights, as well as hers are involved. \* \* \*

“The wife has the right to live with her husband, enjoy his society, receive his support and maintenance and all the comforts and privileges of the marriage relations. These are her, as well as his, natural rights. By virtue of her marriage, her husband’s domicile became her domicile, and thereafter she was entitled to live with her husband, and remain in this country.”

In the Government's brief filed before the Commissioner, commenting upon this case, the District Attorney states that the rights of the woman's husband were so involved that she could not be deported. In the case of *Low Wah Suey v. Backus*, 255 U. S. 460, the Supreme Court held that a Chinese woman who marries a citizen is not exempt from deportation if she commits any social dereliction, that is, if she becomes a prostitute, but her exemption is complete as long as she properly behaves herself. In the case at bar it is obvious that the rights of the Chinese Government to the services of its official are also involved, and their attention has been called to the Court. It is obvious that a complete exemption follows:

In the case of *Hopkins v. Fachant*, 130 Fed. Rep. p. 839, a woman, under an executive order of deportation upon the charge of being an alien prostitute illegally within the United States and deportable as such, married a citizen of the United States, the syllabus being as follows:

"Where an alien woman, who has come into this country, pending proceedings for her deportation under the immigration laws, marries a citizen of the United States, she at once takes the status of her husband, and, unless released from custody, is entitled to be discharged on a writ of habeas corpus."

Both of these cases are decisions of the Circuit Court of Appeals for this circuit.

In the syllabus just quoted from it is mentioned that the marriage took place "pending proceedings

for her deportation,” and it is aimed to attract attention to the record of the case itself, which will show that the marriage in this case actually took place, not only after the warrant of deportation had been issued, but after the habeas corpus proceedings had been commenced in Court. In other words, the marriage was not mentioned in the petition for a writ of habeas corpus, because it had not yet taken place. In the brief filed before the Commissioner by the Government in this case they contended that this decision of the Circuit Court of Appeals was “virtually overruled” by the case of *Ex parte Kaprielian*, 188 Fed. 694. The reading of this last mentioned decision will show that the Court did not claim that its decision overruled the decision of our Circuit Court of Appeals, but on the contrary that Court sought to distinguish the two cases.

In the case of *Ex parte Ow Guen*, reported in 148 Fed. Rep., p. 926, the petitioner was a Chinese laborer in the United States who failed to procure a certificate of registration and upon a trip to China sought re-entry upon the ground of being a merchant. He was denied a landing by the immigration officials upon account of the illegality of his prior residence. The Court in this case says, at page 927, above cited, as follows:

“This Section 6, however, does not provide that an unregistered laborer should not remain in the United States, but only if found there by certain officers, he should be adjudged to be unlawfully there and might be taken before a

judge and ordered to be deported. He would in fact be here and be entitled to all the rights of a resident alien till so proceeded against, adjudged and ordered. He would have, among others, the right to become a merchant, and when he did so he had all the rights under the law, of a merchant.”

In the Government’s brief filed before the Commissioner, commenting upon this case, the District Attorney states that it was a case of a returning merchant who failed to show to the immigration authorities that he was a merchant in Boston, and did thereafter show to the Court that he was a merchant at Lowell, Mass. What the District Attorney states about the *Ow Guen* case is perfectly true, but it is also true that the other point to which attention has just been called is involved, and was decided exactly as set forth, and that is to the effect that a Chinese person might be illegally in the United States, that such a Chinese person had a right to remain here until he was proceeded against, adjudged and ordered deported, as provided in the law, and that while he was here, and before he was so proceeded against he would have “the right to become a merchant,” and when he did so he had all the rights under the law of a merchant. What is held here with respect to the acquiring of a mercantile status is even more true as applied to acquiring an official status, and becoming an attache of the Chinese consulate.

In the case of *In re Tom Hon*, reported in 149 Fed. Rep., p. 842, a Chinese person made application

to enter the United States through the medium of a writ of habeas corpus, after having been denied admission by the immigration authorities. He was released upon bond and thereafter was ordered deported. He could not be found and the order of deportation was unexecuted. The defendant procured a certificate of registration and the Court decided that the petitioner was lawfully domiciled within the United States, notwithstanding the prior judgment of illegality of his residence, the syllabus being as follows:

“A judgment in habeas corpus proceedings, remanding a Chinese person to the custody of a master of a vessel in which he immigrated, for deportation was vacated by the subsequent passage of Act. Cong. May 5, 1892, c. 60, 27 Stat. 25, as amended by Act Nov. 3, 1893, c. 14, 28 Stat. 7 (U. S. Comp. St. 1901, p. 1320), providing for the registration of Chinamen entitled to remain in the country and the registration of petitioner thereunder.”

In the Government's brief filed before the Commissioner, the Government attempts to dispose of the Tom Hon case by stating that the alien's order of deportation was revoked by the subsequent passage of a law and that the alien's registration thereunder gave him the right to remain in this country. It is obvious that Tom Hon was a resident of this country, under a judicial order of deportation, and was illegally resident herein at the time of the passage of the Registration Act, and that Tom Hon did not present those facts to the Collector of Inter-

nal Revenue when he applied for and received his certificate of registration.

The similarity between the case of Tom Hon and the case of this defendant is that this defendant had the right under the law to continue or assume a mercantile status, and when he did so he became a member of the privileged class, and as the statute of limitations for a surreptitious entry has run its course, he cannot now be deported. It is further obvious that the conferring of an official status upon the defendant which exempts him from the operation of these two Chinese Exclusion or Restriction Acts has even a greater legal effect than the Act of Congress relied upon by the Government in explaining the Tom Hon decision in their brief filed before the Commissioner.

The present general immigration law provides for the deportation of objectionable aliens out of the United States. Those aliens who are objectionable by reason of personal immorality may be deported at any time; in other words, the time limit has been removed with respect to social derelictions, but the present immigration law has its three-year limitation as applied to all other offenses, which include those of surreptitious entry. The general immigration law formerly placed the limitation at two years, and at a still earlier period the limitation was placed at one year. A case which arose under the one-year limitation is that of *In re Russomanno*, reported in 128 Fed. Rep., page 528, where the Government sought to deport a boy who

had illegally entered the country, and the Court held that this could not be done unless within one year after the entry. The decision follows:

“The authority to deport this alien is to be found in the Act of 1891 (Act March 3, 1891, c. 551, Sec. 11, 26 Stat. 1086), U. S. Comp. St. 1901, p. 1299, not in the Act of 1903. Inasmuch as he was not seized, even for purposes of deportation, until more than one year had elapsed after his last entry into the United States, the time within which he could be taken into custody under the act of 1891 had fully expired.

“The prisoner is discharged.”

A case which illustrates the two-year limitation is as follows:

In the case of *Botis vs. Davies*, 173 Fed. Rep. 996, it was sought to deport a person from the United States. The syllabus follows:

“Under Immigration Act March 3, 1903, c. 1012, 32 Stat. 1213, which provides in Section 20 that any alien who shall come into the United States ‘in violation of law’ may be deported at any time within two years after arrival, and in Section 21 that the Secretary of Commerce and Labor shall deport aliens found in the United States ‘in violation of this act,’ within three years after landing, a ‘deportation’ for entering in violation of any prior law can only be made within two years, which means the actual deportation, and not merely the commencement of proceedings.”

The Supreme Court of the United States has decided that Chinese persons who surreptitiously enter the United States may only be deported under the provisions of the general immigration law within

the period of three years of their surreptitious entry. The case is that of *United States vs. Wong You*, 223 U. S. 67, in which the Court held:

“This is a writ of habeas corpus. It was dismissed by the District Court (176 Fed. 933), but was sustained by the Circuit Court of Appeals, which ordered the parties concerned to be discharged from custody, 104 C. C. A. 535, 181 Fed. 313. The parties are Chinamen who entered the United States surreptitiously, in a manner prohibited by the Immigration Act of February 20, 1907, chap. 1134, No. 36, 34 Stat. at L. 898, 908, U. S. Comp. Stat. Supp. 1909, pp. 447, 466, and the rules made in pursuance of the same, if applicable to Chinese. They were arrested in transitu and ordered by the Secretary of Commerce and Labor to be deported. Nos. 20, 21. But as it transpired in the evidence that they were laborers, the Circuit Court of Appeals held that they could be dealt with only under the Chinese Exclusion Acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that such persons were tacitly excepted from the general provisions of the Immigration Act, although broad enough to include them, and although of later date.

“We are of opinion that the Circuit Court of Appeals made a mistaken use of its principles of interpretation. By the language of the Act any alien that enters the country unlawfully may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. It seems to us unwarranted to except the Chinese from this liability because there is an earlier, more cumbrous proceeding which this partially overlaps.”

These seven cases just cited clearly show that aliens entering the United States illegally, and though by their own act defeating the proper operation of the law, none the less may also by their own act correct the illegality of their residence. In the case of Tsoy Sim, *supra*, the woman was illegally in the United States, and corrected the illegality of her residence by marrying a citizen. In the case of Hopkins v. Fachant, the woman was actually under an executive order of deportation when she married a citizen, and she being a Caucasian woman, by her marriage immediately took the status of her husband, and was invested with full rights of citizenship. In the case of Tom Hon there was an actual and unexecuted judicial order of remand against the Chinese person, and he by his own act in procuring a certificate of registration in conformity with the terms of the subsequently passed Registration Act cured the prior illegality of his residence. In the case of Ex parte Ow Guen, *supra*, the defendant was illegally within the United States and had he been arrested prior to obtaining a mercantile status he could have been deported, but by his own act he acquired a mercantile status prior to his arrest, and therefore could not then be deported as a laborer. In the case of In re Russomanno, *supra*, and Botis v. Davies, *supra*, the aliens had their illegal residence within the United States cured by the passage of time after their entry; in other words, the one year having elapsed in the first case, and two years having elapsed in the second case, the Government was debarred from de-

porting them upon the charge of illegally entering the country.

In the case of *U. S. v. Wong You*, *supra*, it is shown that the immigration authorities may only deport an alien for surreptitiously entering the country, providing their proceedings are instituted within three years after such clandestine entry. The Act contains its own limitation of three years, and if the parties so violating the Act are not proceeded against within that limitation, the Government cannot thereafter urge the illegality of their residence.

The cases relied upon by the Government in this matter before the Commissioner might with equal force be quoted in favor of the defendant.

The case of the *United States v. Chu Chee*, 93 Fed. Rep., p. 797, expressly holds and finds that the defendants were minor Chinese children who had been within the United States less than three years and they were ordered deported because they took the status of their father, who was a laundryman, the decision upon this point being:

“But it appears affirmatively that they were at that time the minor children of a Chinese laborer and that they are still minors. The status of the defendants, under the laws, was that of the father. The policy of the Exclusion Acts is to prohibit the entry into the United States of the entire class of the Chinese laborers as a class. \* \* \*

“The defendants belonged to that class upon their arrival in this country and they so continued up to the time of their arrest;—and they

were not entitled to remain in the United States and should have been deported. Judgment reversed.”

The case of *Mar Bing Guey v. the United States*, 97 Fed. Rep. 576, the second case relied upon by the Government, is singularly similar to the preceding case. The Chinese entered the United States as the minor son of an alleged merchant. Within three years of his landing he was arrested and charged with being illegally within the United States, the contention being that his father was not a merchant, as claimed, but a laborer. The Court found as follows:

“While the testimony shows that Mar Wing Joh has owned an interest in two mercantile establishments at El Paso, and still retains an interest in one of them, it is further shown, in the written stipulation of counsel, that he has not actively engaged in conducting the business, but that he has a third interest in a restaurant, of which he is the head cook, and that he has been cooking since the date of his certificate of residence, issued to him as a laborer in 1894. Tested by the plain provisions of the statute, he is not a merchant, but a laborer, and is entitled only to such rights and privileges as pertain to Chinese persons of his class.”

And from page 580 of the same citation as follows:

“The Circuit Court of Appeals for the Ninth Circuit, in the case of *U. S. v. Chu Chee*, supra, held that the status of minor children, under the laws, was that of the father, and that ‘the policy of the Exclusion Acts is to prohibit the entry into the United States of the entire class of Chinese laborers as a class’.”

The District Attorney is in error in commenting in his brief filed before the Commissioner regarding the last two cases cited. In the case of *U. S. v. Chu Chee*, 93 Fed. 797, where he states that the two defendants were minors who were landed as children of a domiciled merchant, the decision in question shows that the two children did not pretend to be the sons of a merchant at all, but were in fact landed upon a certificate practically complying with the terms of Section 6 of the Act of May 6, 1882, as amended by the Act of July 5, 1884, as far as the contents of the certificate were concerned save that the certificate was not issued by the Chinese Government, but was issued by our consular representative, whose functions, under the law, were restricted to vising such a certificate when it had been properly issued by the Chinese Government. These two boys were not members of the exempt class, nor was the defendant in the case of *Mar Bing Guey v. U. S.*, 97 Fed. 576, but on the exact contrary, the Chinese persons in these cases were held by our own Circuit Court of Appeals to be minor children of laborers, and that legally they partook of the status of laborers and that they were therefore to be considered as laborers and not as persons entitled to admission into the United States, nor indeed as members of the favored or exempt classes. The District Attorney states that these boys might have gone to China and procured a Section 6 certificate and returned and been landed, but this assumption upon the District Attorney's part is

not borne out by the decisions, because the decisions are to the effect that the boys have the status of laborers and it therefore "admits of serious question" whether they were entitled to admission even had they presented Section 6 certificates.

The fourth and last reported case relied upon by the plaintiff leads us to a consideration of what is technically known as a "surreptitious entry." The case referred to, that of *Ex parte Li Dick*, 174 Fed. 674, was a habeas corpus proceeding to review the cause of detention by the immigration officials of Li Dick. It appears that Li Dick surreptitiously entered the United States on October 22, 1909, and he was immediately taken into custody by the immigration officials who procured a warrant of arrest from the Secretary of Commerce and Labor, in which it was charged that the defendant had entered without inspection; that is, surreptitiously. The trial amply established these facts and the Secretary ordered Li Dick deported. The Court was applied to and the contention raised that as the defendant was a Chinese person he would have to be proceeded against under the Chinese exclusion laws in a judicial deportation proceeding, and that, as he was held as a result of an executive deportation proceeding under the immigration law, he should be discharged, and the Court should further hear evidence as to his present mercantile status. In disposing of this matter the Court held that the defendant violated the immigration law by his surreptitious entry, and that he should be ordered

deported, and further, that if he had an exempt status under the Chinese exclusion laws, he should present it upon applying to the proper officials in asking re-admission into the United States. We agree with this decision, but distinguish it from the case at bar in the all important point that such a proceeding is here barred by the statute of limitations, as held in the recent case of *U. S. v. Wong You*, *supra*.

It being shown that deportation after a surreptitious entry must take place within three years, it naturally follows that if such a person is not deported within that time that the illegality of their residence is thereby cured, in this, that the Government, by reason of the lapse of time, is precluded from attacking their residence. This brings us irresistably to the conclusion that after three years have elapsed following a surreptitious entry, a legal residence then results.

In the case of *U. S. v. Wong Lung*, 103 Fed. Rep., the Court holds (Wheeler, District Judge) as follows (*Italics volunteered*):

“This case shows that the appellant has been a member of a firm of merchants dealing in groceries at Hartford, Conn., for 7 years, having \$1000 invested as his share of the capital. This entitled him to remain in the United States. *Lau Ow Bew v. U. S.*, 144 U. S. 47, 12 Sup. Ct. 517, 36 L. Ed. 340. The case also shows that he has lately visited China, and returned, but does not show the manner of his re-entry, nor any connection between his arrest for being unlawfully in the United States and

his return, *if that would be material as to his right to remain when actually and peaceably here.* Appellant discharged.”

While in the case of *U. S. v. Lee You Wing*, 208 Fed. Rep. 166, and which is a more recent case, the Court holds as follows (page 167):

“I think the fact that the defendant applied for such a certificate is entitled to considerable weight. He would probably not have dared to apply for such a certificate if he was a common laborer. The fact, too, that Mr. Wiley, although refusing to give it, took no action against the defendant for two years later, is still of greater significance. The government’s counsel in his brief states as an explanation of this delay that Chinese persons employed in mercantile pursuits and ostensibly having an interest in the firm in which they are working, even if they have no certificates, are not usually molested unless found actually engaged in laboring pursuits.

“But a man is either a merchant or not a merchant. If a merchant is unfortunate in business, and is obliged to become a laborer, that is no reason for deporting him because he has no certificate. He was not obliged to have a laborer’s certificate if he was a merchant.

Upon this record, I think that, if the defendant had continued to occupy the same relation to the firm of Wah Chong Lung and Co. that he occupied in 1910, he would not have been proceeded against; and, if that is so, the fact that he has since become a laborer does not warrant his deportation.”

This case just cited has since been considered and determined by the Circuit Court of Appeals for the Second Circuit, the case being *U. S. v. Lee You*

Wing, 211 Fed. 939, in which the Court said, Judge Rogers speaking:

“The Court below attached, and we think properly, some significance to the fact that, although he was refused a certificate on April 8, 1910, no steps were taken to have him deported until October 22, 1912, two years and six months afterwards. If he was unlawfully within the country in 1910, it was the duty of the officials of the government to have taken steps at that time to have him arrested and deported. The fact that during this long period of inaction the government made no move against him, implies a lack of confidence in its case. We are also inclined to attach some importance to the fact that the defendant voluntarily applied to the government officials in 1910 for a certificate to establish his status as a merchant. It is extremely doubtful whether he would have ventured to make such an application if he had entertained a doubt as to his ability to establish the facts necessary to sustain his application, with the danger of deportation threatening him if he brought the matter to the attention of the government and failed to secure the certificate.”

The Government, in its presentation of this matter, has not presented to the Court a single case in which a Chinese merchant or member of the exempt classes has been deported, but on the contrary, all of the cases presented by the Government under the Chinese Exclusion laws are concerning cases where the defendant then had the status of a laborer. The entire Chinese legislation is directed against Chinese labor, and therefore when a Chinese person works or is engaged as a laborer he commits a continuous

violation of the law, whether he has resided in this country for one year or for fifty years, and if he is without the certificate of registration he is liable to deportation. The point we advance, however, is that when the defendant is not a laborer and has not been a laborer admittedly now for upwards of 61½ years last past, he is not one who can be proceeded against as a laborer, but on the other hand, he is a merchant and a member of the privileged classes protected by the treaty between the United States and China. It is not pertinent to bring into a discussion of this feature of the case the deportation cases under the immigration law, because whatever is said with respect to those cases, it stands admitted that they are without force after the defendant has resided in this country for a period of three years following the surreptitious entry, and therefore the case of *Ex parte Li Dick*, *supra*, is inapplicable. The District Attorney contends that we cannot place a limitation upon the illegality of residence to prevent deportation of a merchant. We do not agree with him and call attention to the treaty between the United States and China, promulgated November 17, 1880, in Article II of which it is provided:

“Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.”

While it is also provided in Article I:

“This limitation or suspension shall be reasonable, and shall apply only to Chinese who may go to the United States as laborers, other classes not being included in the limitations.”

It will be noted that this treaty accords to the defendant, as such merchant, all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation, and therefore, when the subsequent Immigration Act was passed, placing this limitation of three years within which a prosecution for a surreptitious entry is to be made, the defendant is certainly entitled to the benefit of it. On this point we desire to state that the guarantee of this Government contained in its treaty with China is not to be lightly disregarded, and in this connection we desire to cite the words of “Justice Harlan” in the case of *Chew Heong v. U. S.*, 112 U. S. 536, in which it is held:—

“For since the purpose avowed in the act was to faithfully execute the treaty, any interpretation of its provisions would be rejected which imputes to Congress an intention to disregard the plighted faith of the government, and, consequently, the court ought, if possible, to adopt that construction which recognized and saved rights secured by the treaty.”

It will be noted that the laborer is the only person authorized by treaty to be legislated against, and that the merchant is specifically exempted, and that all subsequent legislation should be construed and

interpreted in the light and in the spirit of these treaty stipulations. The very acts of Congress under which it is sought to deport this man were passed with the avowed purpose of enforcing these self-same treaty stipulations.

In the case of *U. S. v. Jamieson*, 185 Fed. Rep. 165, the Court said (page 166) :—

“It must be conceded in the first place that there is no statute absolutely excluding any Chinaman from the United States except a laborer. Act May 6, 1882, c. 126, 22 Stat. 58 (*U. S. Comp. St.* 1901, p. 1305), specifically refers to laborers only; and though the act of September 13, 1888, was unquestionably broadly comprehensive of all Chinese persons, sections 1 and 15 admittedly never went into effect, and it is very doubtful whether sections 2, 3 and 4 ever did either. Sections 5 to 14 inclusive, all of which have been from time to time re-enacted, are administrative sections, and do not exclude any new classes.”

A very important case which confirms the distinction sought to be drawn is that of *Wong You v. U. S.*, 181 Fed. 313, which is a decision by the Circuit Court of Appeals for the Second Circuit, which is the same case which was afterwards decided by the Supreme Court of the United States, and is reported as *U. S. v. Wong You*, 223 U. S., *supra*. In determining this matter in the Supreme Court, that tribunal held that a Chinese laborer who surreptitiously entered the United States might be deported within a period of three years, under the provisions of the immigration law, notwithstanding that

such Chinese laborer was also deportable under the Chinese Exclusion or Restriction Acts of earlier date. The Supreme Court in deciding this case only decided that the Circuit Court of Appeals made a mistake in the rule of interpretation in holding that the General Immigration law should be read as silently excluding from its operation the cases which have been provided for by the special act. Apart from this the decision of the Circuit Court of Appeals was not adversely commented upon by the Supreme Court, and it may therefore be assumed to correctly set forth the principles involved. The opinion which was written by Circuit Judge Noyes is in part as follows:—

\* \* \* “The Chinese exclusion acts deal with the removal of Chinese laborers unlawfully in this country and prescribe the procedure to be followed in deporting them. These statutes constitute comprehensive particular legislation with respect to that subject. It follows, then, under the rule of interpretation, that the immigration act—the later general statute—although in its terms including all aliens, applies only to those Chinese aliens who are not subject to removal by the particular Chinese enactments. \* \* \*

It appears from the meager record that these petitioners are Chinese laborers and—if the government’s contentions be well founded—that they are aliens and subject to deportation in accordance with the provisions of the statutes relating to the Chinese. \* \* \*

\* \* \* And the immigration act—if the government chose to act under it—would supersede the Chinese statute, because it is evident that no alien Chinese laborer could come into

this country unless he enter surreptitiously and without inspection. But any such interpretation of the statutes would conflict with the rule which we have considered, under which both statutes do not apply to the same thing, but the later applies to those cases within its general language not within the provisions of the earlier; that is, as already pointed out, the Chinese statutes prescribe the procedure to be followed in removing alien Chinese laborers, while the immigration act states the procedure for the deportation of all other aliens unlawfully in this country including Chinese other than laborers. We think that these petitioners, being subject to removal according to the provisions of the Chinese exclusion laws, are not subject to removal in accordance with the procedure of the immigration act.

This conclusion makes no distinction in favor of the Chinese. Chinese laborers are excluded by the Chinese act. All other Chinese persons, not being excluded by that act, are subject to the provisions of the immigration act. A Chinese laborer, with or without a loathsome disease, cannot enter at all. The Chinese act governs the case. A Chinese merchant would not be excluded by that act, but would be excluded by the immigration act if he had a loathsome disease or other disability prescribed in such enactment. \* \* \*

For these reasons, we hold that, as these petitioners appear to be subject to deportation in accordance with the enactments particularly relating to Chinese, they are not subject to removal under the provisions of the immigration act, and consequently are unlawfully held by process—either of arrest or deportation—issued under such act. If, however, proceedings should be instituted under the Chinese statutes, and it should be made to appear that the petitioners are not subject to deportation thereunder, this

opinion and the discharge of the petitioners in the present proceeding will not prejudice the institution of another proceeding under the immigration act."

In deciding this case the Supreme Court only reversed it upon the point that a laborer was also excludable under the General Immigration law. In the Supreme Court upon this point it was held, *U. S. v. Wong You* (*supra*), 223 U. S. 67:—

"\* \* \* They were arrested in transitu and ordered by the Secretary of Commerce and Labor to be deported. Nos. 20, 21. But as it transpired in the evidence that they were laborers, the circuit court of appeals held that they could be dealt with only under the Chinese exclusion acts of earlier date. Those acts make it unlawful for any Chinese laborer to come from any foreign place into the United States, or, having so come, to remain there, and provide a different procedure for removing them. Hence it was concluded that such persons were tacitly excepted from the general provisions of the immigration act, although broad enough to include them, and although of later date."

Previously in this brief I have given the determination of the Supreme Court upon the question involved, which was to the effect that a Chinese laborer was likewise deportable under the General Immigration law; if he entered the country in violation thereof. This holding by the Supreme Court, however, does not impair the distinction drawn by the Circuit Court of Appeals, which is that the Chinese Exclusion and Restriction Acts only provide for the deportation of laborers. The Congress

of the United States was only authorized under the treaty with China to legislate against laborers, and it being conclusively shown, and in fact admitted that the defendant in this matter has had a mercantile status for six years and a half last past, and that he has had an official status since November of 1913, as hereinbefore set forth, it clearly follows that he cannot be deported as a laborer, as in point of fact he is not such. His status as a Chinese official exempts him entirely from the provisions of the Chinese Exclusion or Restriction Acts, while his status as a merchant exempts him from being deported as a laborer.

The administrative officers of the United States early applied to the courts for a ruling to determine that the rights of merchants were infringed upon by the acts of Congress herein complained of, in other words, to show that the acts had a broader significance than could possibly flow from the treaty, but the Supreme Court of the United States in *Tom Hong v. United States*, 193 U. S. 517-521, did not assent to this view, and their language in view of the facts involved in this case is indeed significant. The Court, Justice Day speaking, held:

“On the part of the government, it is contended that when a Chinese laborer is apprehended under this act and found without a certificate, and claiming to have been a merchant during the period of registration, he is subject to deportation unless it is affirmatively shown, to the satisfaction of the commissioner or court, that he was a merchant, as defined by the statute, during such period of registration.

“We do not find it necessary to determine this question in the cases now before us, for, in the opinion of the court, the testimony shows that the appellants were ‘merchants’ within the definition laid down by the law.”

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### THIRD.

HAS NOT THE COURT NOW JURISDICTION IN THIS MATTER TO EXAMINE INTO THE MERCANTILE STATUS OF THE DEFENDANT FOR THE YEAR PRIOR TO HIS DEPARTURE FROM THE UNITED STATES ON THE 9TH DAY OF JULY, 1907?

I now again advance the contention that the defendant was properly before the District Court, and the Government was precluded from raising the point of surreptitious entry by reason of the limitation contained in the immigration law, and probably also the general statute of limitations, and being before that Court, and the immigration officials having lost jurisdiction over the defendant by reason of the lapse of time, I feel should the District Court not having been satisfied to discharge the defendant upon either or both the official and mercantile status of the defendant acquired since his entry, that it would have been proper and incumbent upon the District Court to receive evidence showing that the defendant was a merchant for one year prior to his departure from the United States for China, the decision on the admissibility of this evidence being reserved and otherwise disposed of in the decision. Much the same situation is here presented as confronted the Supreme Court in the case of Chin Yow

v. U. S., 208 U. S. p. 8, wherein the Court held that the immigration officials had lost jurisdiction of the appellant by reason of the unfairness of the hearing accorded, and the Supreme Court found as follows:—

“But, on the other hand, as yet the petitioner has not established his right to enter the country. He is imprisoned only to prevent his entry, and an unconditional release would make the entry complete without the requisite proof. The courts must deal with the matter somehow, and there seems to be no way so convenient as a trial of the merits before the judge. If the petitioner proves his citizenship, a longer restraint would be illegal. If he fails, the order of deportation would remain in force.”

In the case at bar the immigration officials are deprived of jurisdiction by reason of the limitations above mentioned. In the habeas corpus case instituted upon behalf of this defendant to obtain his release from the immigration officials who had summarily taken him into custody for the purpose of sending him out of the country under the order of exclusion of 1908, the District Judge held against the jurisdiction of the immigration officers and in favor of the jurisdiction of the United States Commissioner before whom this matter originated,—and the District Court then, on appeal from the Commissioner, properly having jurisdiction over the defendant, and the Government having failed to produce any evidence showing or tending to show that the defendant is a laborer, that we were therefore entitled to show the mercantile status of the de-

fendant and claim the exemption which follows from it. It is contended by the defendant that much the same condition developed in this case as was presented in the case of *Ow Yang Dean v. U. S.*, decided by the Circuit Court of Appeals for this circuit, reported in 145 Fed. Rep. 801, in which a conspiracy existed to keep the defendant out of the United States, save, however, with this distinction that in the case of *Ow Yang Dean* the immigration officials landed the defendant, and thereafter repenting of their action, sought to have him deported in a judicial deportation proceeding, whereas in the present case the opposition of the immigration officials to the defendant was developed prior to and prevented an order of admission being entered in his case. The defendant in this respect feels that his present official and mercantile status is sufficient to show the legality of his residence in the United States, and should the Court hold otherwise, that the defendant should then in this present proceeding be permitted and entitled to show that he was a merchant for more than one year prior to his departure for China, and he would like to present evidence to that issue before the District Court.

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In finally submitting this matter, I desire to state that the exemption from prosecution for surreptitiously entering the United States exists as to aliens after an elapse of three years from the date of such surreptitious entry, this being a right and

privilege which is accorded by the General Immigration law to all aliens who surreptitiously enter the United States, and article two of the treaty between the United States and China prescribing as it does that Chinese subjects, who are merchants, etc., shall have all the privileges, immunities and exemptions which are accorded to citizens and subjects of the most favored nation, and it therefore follows that this treaty being self-operative, and being the supreme law of the land, likewise imposes this exemption in favor of the privileged classes of the Chinese race. It is, indeed, difficult to understand the extreme hostility of the Government to the defendant in this case. Any Japanese or Hindu laborers, who are infinitely more objectionable to our people than Chinese officials and merchants, may surreptitiously enter this country, and after the elapse of three years live in perfect security from deportation on account of the method of their entry. Is it conceivable or possible that Congress intended that this exemption should be withheld from a Chinese official and merchant? Certainly not, because it would be a plain violation of the plighted faith of our Government, so well spoken of by Justice Harlan in the case of *Chew Heong v. U. S.*, *supra*. What is the offense of this defendant? He entered the United States 34 years ago. He has testified to this under oath. He procured a certificate of registration 23 years ago, and the certificate, or the copy issued in lieu thereof, is introduced in evidence. He was registered as a pawn broker, or a party

other than a laborer. He applied to go to China as a laborer, presenting his certificate as a condition precedent to said right, and submitted evidence that he had a wife living in this country, and also property interests here to the extent of over \$1000.00. This laborer's departure certificate was approved by the Deputy Collector of Customs for the Port of Los Angeles. His return certificate was denied at San Francisco, the contemplated port of departure, for the reason that the certificate described the holder as a person "other than a laborer," and gave his occupation as a pawnbroker. The then ruling of the department being that persons holding registration certificates describing them as persons "other than laborers" could not avail themselves of the right to depart as a laborer, and also that the department then construed that a pawnbroker was a merchant. The present rules of the Department of Labor upon this point are in conformity with the applicant's original claim, and any Chinese person having a certificate of registration, or any other evidence showing lawful entry into the United States, may depart as a laborer, the rule in question being rule No. 12 promulgated under the authority contained in the Chinese exclusion or restriction acts. It will therefore be seen that this defendant sought to comply with the law, and was only denied the return certificate by reason of the misinterpretation of the law by the Government authorities. Certainly these facts present a situation which show the Government's case to be entirely devoid of any

principle, equity, justice or fairness in its favor, and on the contrary it shows that the defendant was lawfully domiciled in the United States before he went to China; that he had the necessary property and family qualifications to go to China, and return as a laborer, and that he was dissuaded from this course by the Government officers, who held that because he was registered as a person "other than a laborer," that he could not depart as laborer. It is in evidence and affirmatively shown by the defendant that he has been a merchant ever since his surreptitious re-entry complained of, and in fact it is admitted and conceded by the Government that there is no violation of the spirit of the law, insofar as it prescribes to the entry of Chinese laborers in this country, but only the technical method of the re-entry of the defendant. From the appearance of this man it is apparent that he is not of the laboring class, and that he has not done any manual labor for a great many years. The duration of the defendant's absence from the United States, counting from his departure from Honolulu, through the Port of Honolulu, and return to the Port of Honolulu, is within the period of one year, during which laborers may absent themselves.

We feel that every principle of equity and justice in this matter should prompt the Court to make an order that the defendant being a Chinese official, that the statutes which are the source of the Court's authority in this matter, do not apply to the defendant, and that he therefore cannot be deported there-

under, and further that the defendant being now and having been for the past six years and a half a Chinese merchant (now seven and a half years), that he is exempt from the deportation feature of the Chinese Exclusion and Restriction acts, and cannot be deported as a laborer, and further that the defendant may not now be deported after an elapse of 6½ years since his re-entry into the United States, without giving him an opportunity to submit evidence before the District Court that he was a merchant for a year prior to his departure from the United States for China, the immigration officials having lost jurisdiction of the defendant, and he having been properly before the District Court. It is respectfully urged that the judgment entered herein should be reversed and the appellant discharged from custody by reason of his official or mercantile status, or failing which, that the judgment should be reversed with instructions to permit the appellant to introduce evidence before the District Court of his mercantile status for the year prior to his departure for China.

Dated, San Francisco,  
February 21, 1917.

Respectfully submitted,

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